Supreme Court of the United States.

OCTOBER TERM, 1908.

No. 457. 139.

DAVID R. JULIAN, SHERIFF; MRS. CLEMYE JAMES, ADMINISTRATRIX OF W. A. JAMES, AND MRS. FANNIE E. HOWARD, ADMINISTRATRIX OF JOHN H. A. HOWARD, PETITIONERS,

vs.

THE CENTRAL TRUST COMPANY AND THE SOUTHERN RAILWAY COMPANY.

Petition for Writ of Certiorari Requiring the United States Circuit Court of Appeals for the Fourth Circuit to Certify to the Supreme Court, for Its Review and Determination, the Cause of David R. Julian, Sheriff; Mrs. Clemye James, Administratrix of W. A. James, and Mrs. Fannie E. Howard, Administratrix of John H. A. Howard, Appellants, vs. The Central Trust Company and The Southern Railway Company, Appellees.

B. F. LONG,
LEE S. OVERMAN, AND
A. C. AVERY,
Attorneys and Counsel for Petitioners.

(18,685.)

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To the Honorable Supreme Court of the United States:

The petition of David R. Julian, sheriff of Rowan county; Mrs. Clemye James, administratrix of W. A. James, and

Mrs. Fannie E. Howard, administratrix of John H. A. Howard, respectfully shows:

First. That your petitioners were the appellants and The Southern Railway Company and The Central Trust Company of New York were appellees in a cause lately pending in the circuit court of appeals for the fourth circuit, wherein an opinion was filed in said court sitting at Charleston, South Carolina, on the 7th day of May, A. D. 1902, and a decree affirming the judgment of the circuit court for the western district of North Carolina was entered in accordance with said opinion. A certified copy of the record of said cause, which was numbered 438 in said circuit court of appeals, will be hereto attached.

Second. That the decree of the said circuit court, which was affirmed, as aforesaid, by the said circuit court of appeals, enjoined and restrained the petitioner David R. Julian, sheriff of Rowan county, in the State of North Carolina, from selling under executions issuing from the superior court of said county of Rowan, in pursuance of the law of said State, upon two judgments theretofore rendered in said court respectively in favor of the petitioners Clemye James, administratrix of W. A. James, and Fannie E. Howard, administratrix of John H. A. Howard, and against the Western North Carolina Railroad Company, the franchise and property of said company, which said sheriff had levied upon by virtue of said executions, in pursuance of the laws of the State of North Carolina, as will hereinafter more fully appear, and had duly advertised for sale to satisfy said executions.

Third. That the petitioner Clemye James, administratrix of W. A. James, brought an action against the Western North Carolina Railroad Company, in the said superior court of Rowan county, for damages for the negligent killing of her said intestate, at the May term of said court, A. D. 1897, and upon the trial of said action in said court the jury found all issues in favor of said company except the issue of law whether, under the admitted facts, the Western North Carolina Railroad Company was answerable for the negligence of the Southern Railway Company in operating its road, and this issue was withdrawn from the jury and decided adversely to the plaintiff by the court; but upon appeal the supreme court of North Carolina reversed the said ruling of said superior court, and ordered that judgment be entered in the said court below against the Western North Carolina Railroad Company for the amount of damages assessed by the said jury for the killing of the said intestate, W. A. James, by the negligence of the Southern Railway Company.

James *vs.* Railroad, 121 N. C., 523.

Fourth. That, in the said action brought against the Western North Carolina Railroad Company, A. B. Andrews, first vice-president of the Southern Railway Company, answered in the capacity of president of the Western North Carolina Railroad Company, and was represented at the trials and hearings in said supreme court by the counsel employed to represent said Southern Railway Company in said State.

Fifth. That the said supreme court of North Carolina, in its opinion in the said appeal entitled Clemye James, administratrix of W. A. James, *vs.* The Western North Carolina Railroad Company, 121 N. C., 523, held:

1st. That the sale of the franchise and property of the Western North Carolina Railroad Company, created and organized under the laws of the State of North Carolina under a decree of foreclosure of a second mortgage, but subject to the lien of an outstanding first mortgage, did not release that company from liability to the public for the manner in which its road was operated by the Southern Railway Company, a corporation created and organized under the laws of the State of Virginia, claiming as purchaser under said decree.

2d. That section 1255 of the Code of North Carolina (enacted as chapter 101, Laws of 1879, and re-enacted as a part of the Code of North Carolina March 2, 1883) provided that "mortgages of incorporate companies should not exempt the property or the earnings of such incorporation from execution for the satisfaction of any judgment obtained in the courts of the State * * * for torts committed by such incorporation, its agents or its employees, whereby any person is killed or any person or property is injured, any clause or clauses in such mortgage to the contrary notwithstanding," and that the first and second mortgages were both executed in the year 1884, the one on the 1st and the other on the 2d of September, and were executed in contemplation of the said provision of section 1255, and that so long as the first mortgage should constitute a subsisting lien the

corporate existence of the company would not be extinguished and the lien of the first mortgage would be subject, under the provisions of the act of 1879, which were written into it as a contract, to be subordinated to the satisfaction of a judgment rendered for a tort.

3d. That the supreme court of North Carolina had held in Gooch *vs.* McGee, 83 N. C., 59 (decided at June term, 1880), more than four years before the mortgages were executed, that under sections 671, 672, 673, 674, 675 of the Code providing for regulating sales of such corporation the property of a corporation authorized to receive fare and tolls could not be sold, under execution or judicial decree, separate from its franchise.

4th. That the Code of North Carolina had provided in sections 697 and 698 of the Code, "considered in connection with section 701, which passed 1879, and sections 1936, 2005, referred to in section 701," that where the franchise and property of such corporations should be sold they should be reorganized as domestic corporations in accordance with the terms of said sections, and that if the franchise and property had passed unincumbered by said sale, no steps had been taken for a proper reorganization as a new corporation under the laws of North Carolina.

5th. That the said statutes of North Carolina (the Code sections 697, 698, 701, 1936, and 2005) could not be construed as creating a foreign corporation, such as the Southern Railway Company of Virginia, nor was there any authority conferred by the statute law of North Carolina upon the

Southern Railway Company, as a foreign corporation, to become the owner of a railway company created and organized under the laws of North Carolina, and that without express authority from the State a foreign corporation could not become the absolute owner of the franchise and property of a domestic railroad company, such as was the Western North Carolina Railroad Company.

6th. That, being clothed with no express or implied legislative authority to become the owner of the franchise and property of the Western North Carolina Railroad Company, a North Carolina corporation, the Southern Railway Company, while operating the Western North Carolina railroad and controlling the property which is an incident to its franchise, by its consent, was answerable for the torts of its agents and employés whereby persons were killed or injured, but that the domestic corporation was also liable, as is a lessor of a railroad not specially exempted by statute from liability for the torts of a lessee, under the previous rulings of the supreme court of North Carolina in Aycock *vs.* Railroad, 89 N. C., 321, 330, decided at the October term, 1883, of said court, and in Logan *vs.* Railroad, 116 N. C., 940, decided at the January term, 1895, of said court.

Sixth. That theretofore, in May, A. D. 1894, The Central Trust Company, one of the respondents, had filed an original bill in the circuit court of the United States for the western district of North Carolina, at Statesville, against The Richmond and Danville Railroad Company and the said The Western North Carolina Railroad Company, praying for a decree of foreclosure of a second mortgage upon

the franchise and property of said company executed on the 2d day of September, A. D. 1884, but subject to the lien of a first mortgage executed September 1, 1884, on said franchise and property to secure the payment of principal and interest of certain bonds maturing in the year 1914, no default having been made in the payment of the interest accrued on said last-named bonds (see pages —, printed record), and that subsequently to May 3, 1894 (see printed record, pages —), a decree of foreclosure was entered by consent of the defendants in said cause, and in pursuance of said decree the franchise and property of said Western North Carolina Railroad Company was offered for sale by a special master, and the Southern Railway Company, a corporation created and organized under the laws of the State of Virginia, became the purchaser, and the said sale of said franchise and property was confirmed by order of said court, and the said franchise and property was conveyed by said special master to said Southern Railway Company, which thereupon took possession of the road-bed and property of said Western North Carolina Railroad Company on the — day of ——, 1894, by consent of the last-named company, and operated said road as a carrier of freight and passengers until December, A. D. 1896, when the intestates of the petitioners Howard and James were killed by the negligence of said Southern Railway Company, one of said intestates, W. A. James, being a locomotive engineer, and the other, the said John H. A. Howard, a fireman on the same engine, while both were on duty on one of its trains running on the track of the Western North Carolina railroad, and continues to operate said Western North Carolina railroad, claiming title thereto up to the present time.

Seventh. That an action was brought by the petitioner Fannie E. Howard, administratrix of John H. A. Howard, in said superior court of Rowan county, against the said Western North Carolina Railroad Company for damages for the negligent killing of her intestate at the time when said W. A. James was killed, and upon the trial of said action at the ——— term (1898) of said court she recovered judgment against the defendant for the sum of five thousand dollars ($5,000), from which judgment there was no appeal, and that no writ of error was sued out to have the judgment of the supreme court of North Carolina, on said appeal from the superior court of Rowan county in said action entitled James, administratrix, *vs.* Railroad, reviewed.

Eighth. That after the said judgment had been recovered by the petitioner Fannie E. Howard, administratrix, and after the said judgment of the supreme court of North Carolina in James *vs.* Railroad had been certified down to said superior court of Rowan county and judgment had been entered thereon according to said certificate, an action in the nature of a creditors' bill was brought by certain old stockholders of the Western North Carolina Railroad Company, alleging that they were not bound by said decree of foreclosure and asking for the appointment of a receiver, and the petitioners Clemye James, administratrix, and Fannie E. Howard, administratrix, became parties as judgment creditors by virtue of their said judgments against said company.

Ninth. That immediately upon the service of notice of a motion to appoint a receiver, and before a receiver was ap-

pointed, the respondents herein, The Central Trust Company of New York and The Southern Railway Company, filed what was denominated a supplemental bill in said foreclosure suit brought by said Central Trust Company of New York, praying that the plaintiffs in said creditors' bill filed in the superior court of Rowan county be enjoined and restrained from further prosecuting their said action, and from the decree of perpetual injunction granted by Simonton, judge, in said circuit court for the western district of North Carolina, the parties enjoined, the plaintiffs in said proceeding in the superior court of Rowan county, appealed to the circuit court of appeals for the fourth circuit, at Richmond, which court held (98 Fed. Rep., 489) that the judgment below should be so modified as to leave the said Clemye James, administratrix of W. A. James, and the said Fannie E. Howard, administratrix of John H. A. Howard, at liberty to enforce their judgments in the State courts in any other suit or action except that pending, wherein the main relief was that sought by the old stockholders, who were estopped by the said decree of foreclosure in the circuit court of the western district of North Carolina, being represented by the directors of the company who were parties, while the said James and said Howard, not being parties, were not bound by said decree.

Tenth. That upon the mandate sent down to said circuit court in said cause Judge Ewart entered a decree so modifying the said decree of Simonton, judge, appealed from, as "not to prohibit the said Clemye James, administratrix of W. A. James, or Fannie E. Howard, administratrix of John H. A. Howard, from proceeding as they might be ad-

vised with any other suit not based upon the supposed rights of the stockholders of the Western North Carolina Railroad Company with respect to enforcing their judgment," and the said circuit court of appeals refused subsequently to grant a mandamus to compel said circuit court to alter said modified judgment. (See opinion in the record and — Fed. Reporter, —.)

Eleventh. That the supreme court of North Carolina having held in James *vs.* Railroad, *supra*, and later in the cases of Railroad Co. *vs.* Burnett, 123 N. C., 210, and Williams *vs.* Railroad, 126 N. C., 918–920, that no mortgage of an incorporated company would, under the laws of North Carolina (the Code, sec. 1255), operate "to exempt the property and franchise of such corporation from execution for the satisfaction of a judgment obtained in the courts of the State, for torts committed by any such corporation, its agents or employés, whereby any person is killed or any property is injured, any clause or clauses of such mortgage to the contrary notwithstanding," and that the remedy of plaintiffs in such judgments was to sue out execution and enforce their judgments by a sale of the franchise and property of the corporation, notwithstanding the existence of such mortgage or a prior sale under such mortgage, the said Clemye James, administratrix of W. A. James, and Fannie E. Howard, administratrix of John H. A. Howard, through their counsel, proceeded to sue out executions upon their said judgments in the superior court of Rowan county, State of North Carolina, and to cause said executions to be levied upon the franchise and property of said Western North Carolina Railroad Company (which had been held by the supreme court of

North Carolina liable to be sold to satisfy said judgments) by the petitioner D. R. Julian, sheriff of said county, who was, in contemplation of the laws of North Carolina, their agent for such purpose, when the respondents, by supplemental bill in said original foreclosure suit in the circuit court for the western district of North Carolina, applied to Hon. James E. Boyd, as circuit judge of said district, and obtained an order enjoining and restraining said D. R. Julian from selling said franchise or property to satisfy said judgments; whereupon a motion of the other two petitioners, submitted by their counsel, to dismiss the bill, after entering a special appearance, as well as a similar motion of the petitioner Julian, having first been refused, after excepting to said ruling the two said petitioners were made parties defendant on motion of their counsel.

Twelfth. That upon the hearing of the notice to show cause before Boyd, judge, in said circuit court at Greensboro, the injunction was continued, your petitioners appealed, and the decision of the said circuit court of appeals was as set forth in the opinion printed in the record.

Thirteenth. That your petitioners are advised that the supreme court of North Carolina has decided in explicit terms that the two petitioners, James, administratrix, and Howard, administratrix, have the right to enforce their said judgments by a sale of the franchise and property of the Western North Carolina Railroad Company, which is still an existing corporation, and that their remedy, as plaintiffs in execution, was to levy upon said franchise and property, while, on the other hand, the said circuit court of appeals

filed a conflicting opinion, as aforesaid, on the 7th day of May, 1902, at Charleston, affirming the judgment of the Hon. James E. Boyd, judge, sitting as circuit judge, perpetually enjoining your petitioners from proceeding further to enforce the collection of said judgments by a sale of said franchise and property levied upon (all of which appears of record).

Fourteenth. That there is an irreconcilable conflict between the said decisions of the supreme court of North Carolina holding that petitioners have the right to subject said franchise and property to sale under execution to satisfy their said judgments and the said decision of the said circuit court of appeals affirming the judgment of the circuit court, whereby petitioners were perpetually enjoined from selling said franchise by virtue of executions sued out upon said judgments, and your petitioners are advised that where such conflicts arise between circuit courts of appeal and the highest appellate courts of States, as to the construction of the constitution and laws of the State, the Supreme Court of the United States (under its rule laid down in Forsythe *vs.* Hammond, 166 U. S., 506, 514, 515, and in the exercise of its plenary power) will grant a writ of certiorari in order to settle an unseemly controversy as to jurisdiction.

Fifteenth. That your petitioners therefore respectfully submit that under said rule laid down in Forsythe *vs.* Hammond, *supra*, and in the exercise of its plenary power, this court should authoritatively and finally determine and settle the said questions, which have given rise to such unseemly conflict between the court of appeals of the United

States of America and the supreme court of North Carolina.

Wherefore your petitioners respectfully pray that a writ of certiorari may be issued out of and under the seal of this court, directed to the United States circuit court of appeals for the fourth circuit, commanding said court to certify and send to this court on a day certain, to be therein designated, a full and complete transcript of the record and all proceedings of said circuit court of appeals in said case therein entitled David R. Julian, sheriff; Mrs. Clemye James, and Fannie E. Howard, appellants, *vs.* The Central Trust Company of New York and Southern Railway Company, appellees, No. 438, to the end that the said cause may be reviewed and determined by this court, as provided in section 6 of the act of Congress entitled "An act to establish circuit courts of appeals and to define and to regulate in certain cases the jurisdiction of the courts of the United States and for other purposes," affirmed March 3, 1901, or that your petitioners may have such other or further relief or remedy in the premises as to the court may seem appropriate and in accordance with the said act and with the recognized principles of law applicable to the matters set forth in the petition, and that the said judgment of the said circuit court of appeals in said cause and every part thereof be reviewed by this honorable court.

And your petitioners will ever pray.

DAVID R. JULIAN,
CLEMYE JAMES,
FANNIE E. HOWARD,
By ALPHONSO C. AVERY,
Attorney and Counsel for Petitioners.

DISTRICT OF COLUMBIA, }
City of Washington. }

Alphonso C. Avery, being duly sworn, says that he is one of the attorneys and counsel for said David R. Julian, sheriff; Clemye James, administratrix, and Fannie E. Howard, administratrix, petitioners above named, and as such has had personal charge for them of the defense of the suit in equity brought by the Central Trust Company of New York and the Southern Railway Company in the circuit court for the western district of North Carolina against your petitioners, while pending in said circuit court, and of the appeal of your petitioners to the circuit court of appeals from the institution of said suits up to the present time, and also appeared in an action in the superior court of Rowan county entitled Clemye James, administratrix, *vs.* The Western North Carolina Railroad Company, and also in the supreme court of the State of North Carolina, when said last-named action was heard in said court, and in the superior court of Rowan county, when judgment was rendered in 1898 in favor of petitioner Howard, administratrix, and against the Western North Carolina Railroad Company, and has a more perfect and more accurate knowledge of the facts alleged in the petition than the petitioners themselves, and therefore verifies the same, and that the facts therein stated are true to his best information and belief.

ALPHONSO C. AVERY.

Sworn to and subscribed before me this the 3d day of October, 1902.

In witness whereof I have hereunto signed my name and affixed the seal of my office as clerk of the circuit and district court for the western district of North Carolina.

{Seal United States Circuit Court, Western Dist. of N. C., at Asheville.}

W. S. HYAMS, *Clerk.*